Santa Clara University
School of Law

Santa Clara Law Review

Volume 9 | Number 1 Article 5

1-1-1969

New Trial Orders: The Erosion of Code of Civil Procedure Section 657

Richard C. Gardner

COMMENTS

NEW TRIAL ORDERS: THE EROSION OF CODE OF CIVIL PROCEDURE SECTION 657

For a number of years California courts have faced perplexing problems in the formation and review of new trial orders. California Code of Civil Procedure section 657 requires trial judges to specify the grounds upon which a new trial is granted.[1] Trial judges, however, have all too frequently failed to comply with the requirements of section 657.[2] In a continuing effort to salvage such orders, the appellate courts have been compelled to infer that the trial judge intended to base his grant of a new trial upon one of the grounds contained in the statute.[3] The California Legislature, attempting to alleviate the problem of vagueness in new trial orders, amended section 657 in 1965.[4]

---

[1] Before 1919, Code of Civil Procedure section 657 merely listed the grounds for the granting of a new trial. The trial judge was not required to specify which ground was used in granting a new trial. A 1919 amendment added a paragraph providing: "[W]hen a new trial is granted upon the ground of the insufficiency of the evidence to sustain the verdict, the order shall so specify; otherwise, on appeal from such order, it will be presumed that the order was not based upon that ground." Ch. 100 [1919] Cal. Stats. 43d Sess. 141. An amendment to this paragraph in 1939 provided that the specification must be made in writing and filed with the clerk within ten days after granting the motion. Also, the presumption noted above was made conclusive. Ch. 713 [1939] Cal. Stats. 53d Sess. 2234. In 1965 the legislature added several paragraphs amending the statute to require a specification of reasons for the ground on which the new trial was based. In the case of insufficiency of the evidence, a conclusive presumption that the trial was not granted on that ground if no reasons were specified, was added. Ch. 1749 [1965] Cal. Stats. 66th Sess. In 1967 the statute was further amended but in respects not relevant to this comment. CAL. CODE CIV. PROC. § 657 (West Supp. 1967).

[2] In Mercer v. Perez, 68 A.C. 102, 104, 436 P.2d 315, 318, 65 Cal. Rptr. 315, 318 (1968), the court said, "Throughout the nearly 50 years that the requirement of specification of grounds has been on the books, however, the trial judges or their clerks have all too frequently failed to comply with its mandate by means of a simple recitation of the words of the statute."

[3] Even before *Mercer v. Perez* the California Supreme Court attempted to call a halt to the appellate courts' practice of inferring grounds from vague new trial orders. "Section 657 discloses an intent that the required written specification be made in some unmistakable way . . . and this intent will obviously be frustrated if an order for a new trial is sustained upon the ground of insufficiency of the evidence where the language of the order is vague or ambiguous. Whenever the order is in general terms, mentioning no ground, or specifies grounds not including insufficiency of the evidence, we must assume that it was not based on that ground." Aced v. Hobbs-Sesack Plumbing Co., 55 Cal. 2d 573, 578, 360 P.2d 897, 899 (1961). *See* Mercer v. Perez, 68 A.C. 102, 108, 436 P.2d 315, 318, 65 Cal. Rptr. 315, 319 (1968), quoting the above language with approval.

[4] CAL. CODE CIV. PROC. § 657 (West Supp. 1967).

In 1968 the Supreme Court of California interpreted the amended statute in *Mercer v. Perez*.[5] The court set forth strict requirements for a trial judge to follow in granting a motion for new trial on the ground of insufficiency of the evidence. Recent court

---

The verdict may be vacated and any other decision may be modified or vacated in whole or in part, and a new or further trial granted on all or part of the issues, on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such party:

1. Irregularity in the proceedings of the court, jury or adverse party, or any order of the court or abuse of discretion by which either party was prevented from having a fair trial.

2. Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or specific verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors.

3. Accident or surprise, which ordinary prudence could not have guarded against.

4. Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.

5. Excessive or inadequate damages.

6. Insufficiency of the evidence to justify the verdict or other decision, or the verdict or other decision is against the law.

7. Error in law, occurring at the trial and excepted to by the party making the application.

When a new trial is granted, on all or part of the issues, the court shall specify the ground or grounds upon which it is granted and the court's reason or reasons for granting the new trial upon each ground stated.

A new trial shall not be granted upon the ground of insufficiency of the evidence to justify the verdict or other decision, nor upon the ground of excessive or inadequate damages, unless after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the court or jury clearly should have reached a different verdict or decision.

The order passing upon and determining the motion must be made and entered as provided in Section 660 and if the motion is granted must state the ground or grounds relied upon by the court, and may contain the specification of reasons. If an order granting such motion does not contain such specification of reasons, the court must, within 10 days after filing such order, prepare, sign and file such specification of reasons in writing with the clerk. The court shall not direct the attorney for a party to prepare either or both said order and said specification of reasons.

On appeal from an order granting a new trial the order shall be affirmed if it should have been granted upon any ground stated in the motion, whether or not specified in the order or specification of reasons, except that (a) the order shall not be affirmed upon the ground of the insufficiency of the evidence to justify the verdict or other decision, or upon the ground of excessive or inadequate damages, unless such ground is stated in the order granting the motion and (b) on appeal from an order granting a new trial upon the ground of the insufficiency of the evidence to justify the verdict or other decision, or upon the ground of excessive or inadequate damages, it shall be conclusively presumed that said order as to such ground was made only for the reasons specified in said order or said specification of reasons, and such order shall be reversed as to such ground only if there is no substantial basis in the record for any of such reasons.

The 1965 amendment, incorporated above, with which *Mercer* was concerned, required the specification of grounds and supporting *reasons* for insufficiency of the evidence, and the conclusive presumption against such grounds if such specification of reasons was not set forth. The 1967 amendment added the ground of inadequate damages and reflects the change in several provisions. The cases cited in this comment are not concerned with the 1967 amendment.

[5] 68 A.C. 102, 436 P.2d 315, 65 Cal. Rptr. 315 (1968).

of appeal decisions, however, appear to erode the stringent requirements of *Mercer*. Although section 657, as amended, states a number of grounds for granting a motion for new trial,[6] this comment will be limited to examining, in light of *Mercer* and its progeny, the ground of insufficiency of the evidence to justify the verdict.[7]

MERCER V. PEREZ

Mercer v. Perez concerned an automobile accident in which verdict was rendered for the defendants. Plaintiff's motion for a new trial was granted on the "ground" of a miscarriage of justice because the jury should have reached a different verdict.[8] Although the ground of insufficiency of the evidence was not mentioned, the intermediate appellate court[9] held that it was inferred, and that the reasons given in support of the ground were sufficient to be within the requirements of the statute.[10]

On appeal to the California Supreme Court, the decision was

---

[6] *See* note 4 *supra*.

[7] The volume of cases generated by *Mercer*, which consider the ground of insufficiency of the evidence, warrants a comment limited to this ground. Since *Mercer* was decided on January 23, 1968, the following cases have discussed and interpreted the purposes of the 1965 amendment and the *Mercer* decision: Matlock v. Farmers Mercantile Co., 258 A.C.A. 451, 65 Cal. Rptr. 723 (Jan. 1968); Kramer v. Boynton, 258 A.C.A. 230, 65 Cal. Rptr. 669 (Jan. 1968) (modified Feb. 1968); Kincaid v. Sears, Roebuck & Co., 259 A.C.A. 770, 66 Cal. Rptr. 915 (March 1968); Tagney v. Hoy, 260 A.C.A. 377, 67 Cal. Rptr. 261 (March 1968); Funderburk v. General Telephone Co., 262 A.C.A. 978, 69 Cal. Rptr. 275 (June 1968); Higson v. Montgomery Ward & Co., 263 A.C.A. 343, 69 Cal. Rptr. 497 (June 1968); Ridge v. Calabrese Supply Co., 263 A.C.A. 595, 69 Cal. Rptr. 844 (June 1968); McLaughlin v. San Francisco, 264 A.C.A. 377, 70 Cal. Rptr. 782 (July 1968); Hilts v. County of Solano, 265 A.C.A. 181, 71 Cal. Rptr. 275 (Aug. 1968); and Hoover v. Emerald, 265 A.C.A. 725, 71 Cal. Rptr. 500 (Sept. 1968).

[8] The trial court's order stated that "after analyzing the evidence" the court was "of the definite opinion" that there had been "a miscarriage of justice" and the verdict should have been rendered for plaintiffs. Mercer v. Perez, 68 A.C. 102, 108, 436 P.2d 315, 319, 65 Cal. Rptr. 315, 319 (1968). Although this statement by the trial court does not unambiguously comply with the statutory mandate that "the court shall specify the 'ground' on which the motion is granted," the supreme court inferred the order must have been granted on the ground of insufficiency of the evidence. *Id.* at 115, 436 P.2d at 320, 65 Cal. Rptr. at 320.

[9] Mercer v. Perez, 59 Cal. Rptr. 389 (1967), *vacated*.

[10] The court of appeal based its reasoning on the history of the Code of Civil Procedure section 657. In 1961 and again in 1963, the legislature proposed amendments to section 657, both of which were pocket vetoed by the governor. These proposed changes would have required the trial court to specify with particularity in what respect the evidence was insufficient to justify the verdict. One reason the proposed amendments were not passed was that the governor believed the changes would place an undue burden on the trial judge. The appellate court in *Mercer* determined from the legislative history that the statute as amended in 1965 was a compromise and required more than specification of grounds, but less than the specification of the particular respect in which the evidence was not sufficient. The appellate court found that the language of the trial judge in this case was within the amended statute. *Id.* at 393.

reversed.[11] In interpreting the amended statute, the supreme court stated that the legislature added the requirement of specification of the reasons for granting a new trial for two purposes.[12] One was to encourage the trial judge to deliberate carefully before granting a new trial, since ill-considered motions for new trial create needless litigation.[13] The second purpose of the 1965 amendment to section 657 was to make an appeal more meaningful to both counsel and the appellate courts, by pointing out the area of the deficiency.[14]

Interpreting section 657 in light of its purposes, the court formulated certain requirements for new trial orders. The specification by the judge must furnish a "concise but clear statement" of the reasons for the ground for new trial although the content of the specification may vary with each particular case.[15] If the ground is insufficiency of the evidence, the judge must briefly cite the respects in which he finds the evidence to be legally inadequate, and he must also specify the portion of the record which convinces him that a different verdict or decision should have been reached.[16]

Turning to the case at bar, the supreme court found that speculation was required to ascertain the ground upon which the trial judge based his new trial order, and that this ambiguity was the very thing the statutory amendment was designed to eliminate.[17]

---

11 Mercer v. Perez, 68 A.C. 102, 436 P.2d 315, 65 Cal. Rptr. 315 (1968).

12 *Id.* at 111, 436 P.2d at 320, 65 Cal. Rptr. at 320.

13 *Id.* at 111, 436 P.2d at 321, 65 Cal. Rptr. at 321. When a new trial should not have been granted, subsequent needless litigation causes increased attorney's fees, court costs, and further delays the pursuit of justice. For example, a litigant who has already waited two years for a trial is further delayed and harassed by a new trial order; the litigant faces rising attorney fees in addition to the further wait for the remedy to which he may be entitled. Under the pressure of delay and additional fees an injured plaintiff with costly medical bills could be forced into accepting a disadvantageous settlement rather than waiting for another trial.

14 *Id.* When counsel and the court of review can easily ascertain the deficiency of the evidence for which the new trial was granted, much needless searching and speculation is avoided. It becomes unnecessary for the appellate court to search the entire record to find grounds to sustain new trial orders, and the particular insufficiency of the evidence to which opposing counsel may address themselves on retrial is limited. Section 657 also states that the issues, all or part, may be retried. CAL. CODE CIV. PROC. § 657, paras. 1-2 (West Supp. 1967). Specification of the reasons for the grant of a new trial, therefore, may accelerate subsequent litigation by limiting the issues on retrial.

15 *Id.* at 113, 436 P.2d at 322, 65 Cal. Rptr. at 322.

16 *Id.* at 114, 436 P.2d at 322-23, 65 Cal. Rptr. at 322-23. "[W]e hold that if the ground relied upon is 'insufficiency of the evidence' the judge must briefly recite the respects in which he finds the evidence to be legally inadequate; no other construction is consonant with the conclusive presumption on appeal that the order was made 'only for the reasons specified.' Phrasing the requirement in terms of the codification of the trial judge's power in the second paragraph of the amendments . . . such an order must briefly identify the portion of the record which convinces the judge 'that the court or jury clearly should have reached a different verdict or decision.'"

17 *Id.* at 115, 436 P.2d at 319-20, 65 Cal. Rptr. at 319-20.

Nevertheless, by referring to plaintiff's notice of motion for new trial, the court reluctantly concluded that the ground of insufficiency of the evidence was specified.[18] However, the court found that the trial judge did not supply reasons either in the order or subsequent written specification.[19] Therefore, since section 657 conclusively presumes that an order for new trial for insufficiency of the evidence is made only for the reasons specified,[20] and since in *Mercer* the trial judge failed to specify reasons for the new trial order, the supreme court did not consider insufficiency of the evidence as a ground.[21]

Mercer laid down needed guidelines by which the trial judge should test the adequacy of new trial orders. The requirement of a clear statement of reasons and identification of the portion of the record from which the insufficiency arises alleviates the old problem of ambiguity in new trial orders. Subsequent cases, however, point out difficulties in the practical application of the *Mercer* test.

Erosion of the Mercer Test by the Courts of Appeal

The first court of appeal case to interpret the amended statute was *Matlock v. Farmers Mercantile Company*.[22] *Matlock* arose out of an automobile accident in which defendant's employee collided with plaintiff's vehicle. Defendant prevailed, but plaintiff obtained a new trial on the ground of insufficient evidence to justify the verdict. The trial court specified its reasons for granting a new trial as follows: There was no allegation of contributory negligence; agency and scope of employment were not contested; and, substantial evidence indicated defendant's employee was negligent, and as a result of his negligence plaintiff was injured.[23]

---

[18] *Id.*

[19] *Id.* at 114, 436 P.2d at 323, 65 Cal. Rptr. at 323. "[I]f the court's statement that the jury 'should have rendered a verdict for the plaintiffs' is barely construable as the ground of its ruling, it is *a fortiori* inadequate to serve also as the reason for adopting that ground."

[20] Cal. Code Civ. Proc. § 657, para. 5 (West Supp. 1967).

[21] The ground of insufficiency of the evidence (or excessive or inadequate damages) must be stated in the motion for new trial; the appellate court will not search the record for these grounds. A court of review, however, may search the record to find support for the other grounds set out in section 657. Cal. Code Civ. Proc. § 657, para. 4 (West Supp. 1967). In *Mercer* there were no other grounds upon which further inquiry could be based and the new trial order was reversed. Mercer v. Perez, 68 A.C. 102, 117, 436 P.2d 315, 325, 65 Cal. Rptr. 315, 325 (1968).

[22] 258 A.C.A. 451, 65 Cal. Rptr. 723 (1968).

[23] *Id.* at 453-54, 65 Cal. Rptr. at 725. The exact language of the new trial order was, "[T]hat a new trial be and the same is hereby granted to both plaintiffs as to both defendants upon the ground of insufficiency of the evidence to justify the verdict. The reasons for granting the new trial upon the ground hereinbefore stated are as

On defendant's appeal from the new trial order, the appellate court held that the trial judge's reasons encompassed most of the trial record and that requiring the trial judge to show the portion of the record upon which he based his opinion would necessitate an exhausting summary of the entire record.[24] The court relied on the language in *Mercer* which stated that the specification of reasons could vary according to the facts of the particular case.[25]

Shortly after *Matlock* the court of appeal decided *Kincaid v. Sears, Roebuck & Company*,[26] an action for malicious prosecution. Judgment was entered for the plaintiff, and defendant was granted a new trial. The trial court stated that the evidence failed to show that the defendant lacked probable cause for arrest.[27] Plaintiff contended on appeal that, although the trial court specified insufficiency of the evidence as the ground for the new trial order, it did not furnish clear and concise reasons.[28]

The appellate court held that the specification of reasons complied with section 657 as interpreted by *Mercer*. The new trial order met the test of a clear and concise statement of reasons, and as a result stated the insufficiency of the evidence to which counsel and the reviewing court could confine themselves.[29] *Kincaid* discussed and impliedly criticized the language in *Mercer* which required the trial court to identify the portion of the record which indicated the evidence was insufficient to justify the verdict.[30] The court also

---

follows: there being no plea of contributory negligence, and agency and scope of employment being admitted, the case was submitted to the jury for decision upon the issues of negligence of the driver, Henry A. Moranda, proximate cause and damages. There was substantial evidence produced at the trial which disclosed that both plaintiffs were injured and both plaintiffs suffered injury as a proximate result of the automobile accident in which the parties were involved. The evidence further discloses substantial evidence that Henry A. Moranda, agent of Farmers Mercantile Co., was negligent in the manner in which he drove the defendant's automobile at the time and place of the accident involved in this case."

24 *Id.* at 456, 65 Cal. Rptr. at 726.

25 "No hard and fast rule can be laid down as to the content of such a specification, and it will necessarily vary according to the facts and circumstances of each case." Mercer v. Perez, 68 A.C. 102, 113, 436 P.2d 315, 322, 65 Cal. Rptr. 315, 322 (1968).

26 259 A.C.A. 770, 66 Cal. Rptr. 915 (1968).

27 *Id.* at 773, 66 Cal. Rptr. at 917. The trial court granted the new trial for insufficiency of the evidence "[F]or the reason that the evidence does not establish by a preponderance thereof that the defendant did not have probable cause for the arrest of plaintiff. . . ." *Id.* (emphasis omitted).

28 *Id.* at 777, 66 Cal. Rptr. at 919-20.

29 *Id.* at 777, 66 Cal. Rptr. at 919.

30 *Id.* at 775, 66 Cal. Rptr. at 918. Analyzing the *Mercer* requirements, the *Kincaid* court stated, "Our reading of *Mercer v. Perez* leads us to what we believe is the more reasonable and practical construction. We conclude that the trial judge is not necessarily required to cite page and line of the record, or discuss the testimony of particular witnesses, but instead he need only point out the particular 'deficiency' of

stated that in cases of misconduct of a jury or of failure to find on a material issue resulting in a verdict against the law, it is easy to point to the exact reason for granting a new trial. But, in cases of insufficiency of the evidence it may not be possible for the trial judge to substantiate his reasons by isolating the portion of the record which indicates the insufficient evidence;[31] that is, it is not practical for the trial judge to point out all the portions of the record from which he draws his inferences in deciding that the evidence is insufficient. The *Kincaid* court stated that in ordinary negligence actions a brief recital of reasons for insufficiency may be contained in a statement that the moving party was not negligent, or that the other party was contributorily negligent.[32] The court reasoned that the statute itself does not expressly require the trial judge to indicate the portions of the record upon which the motion for new trial is based.[33] The statute states that the new trial shall be ordered only if "[A]fter weighing the evidence, the court is convinced from the entire record, including reasonable inferences therefrom, that the court or jury clearly should have reached a different verdict or decision."[34] The court therefore concluded that the reasons explaining the grounds for a new trial need only contain a clear statement which would allow counsel and reviewing court to know the scope of the deficiency in the evidence.[35] A rehearing was denied by the supreme court.

In *Funderburk v. General Telephone Company*,[36] the court of appeal accepted the reasoning of *Kincaid* and restated the proposition that the trial judge, when granting a motion for new trial, need only furnish a clear and concise statement of reasons and need not specifically point to a portion of the trial record.[37] *Funderburk* involved an automobile accident. The jury reached a decision for the defendant and the trial judge asked the foreman whether or not the jury had found the defendant negligent.[38] The foreman answered that the jury did not find the defendant negligent.[39] The trial judge granted a new trial on the ground of insufficiency of the evidence to justify the verdict, reasoning that defendant driver was

---

the prevailing party's case which convinces him the judgment should not stand. This accomplishes the purpose of the statute by enabling a reviewing court to 'determine if there is a substantial basis for finding such a deficiency.' "

31 *Id.* at 776, 66 Cal. Rptr. at 919.

32 *Id.*

33 *Id.* at 776-77, 66 Cal. Rptr. at 919.

34 CAL. CODE CIV. PROC. § 657, para. 3 (West Supp. 1967).

35 259 A.C.A. at 778, 66 Cal. Rptr. at 920.

36 262 A.C.A. 978, 69 Cal. Rptr. 275 (1968).

37 *Id.* at 982, 69 Cal. Rptr. at 278.

38 *Id.* at 980, 69 Cal. Rptr. at 276.

39 *Id.*

"negligent in the operation of his vehicle."[40] The judge made no mention of contributory negligence, nor did he ask the jury how it found on that issue. The appellate court stated that new trial orders would not be reversed simply because the trial judge did not set forth each step in the reasoning which led to the new trial order.[41] This rationale assumes that the trial judge knew that contributory negligence would bar the plaintiff and therefore must have reasoned against the defendant on that issue.[42] *Funderburk* cited *Kincaid* for the rule that specification of reasons in terms of an ultimate fact is adequate to satisfy the statute.[43]

Still another court of appeal case, *Ridge v. Calabrese Supply Company*,[44] disregarded the *Mercer* "portion of the record" test. The court cited both *Matlock* and *Kincaid* as authority, and held by implication that it was not necessary to identify the exact portion of the record upon which the trial court relied.[45] Even though the trial judge did not point to a portion of the trial record, he did furnish an excellent and detailed specification of reasons for believing that defendant was negligent in the operation of the mechanism which caused injury to plaintiff.[46] The court of appeal upheld the order for new trial.

---

[40] *Id.* at 981, 69 Cal. Rptr. at 277-78.

[41] *Id.* at 986, 69 Cal. Rptr. at 280.

[42] *Id.* at 982, 69 Cal. Rptr. at 277.

[43] "[W]e think that *Kincaid* stands for a rule that a specification of reasons couched in terms of ultimate fact is adequate." *Id.* at 985, 69 Cal. Rptr. at 279. This reasoning would make a statement such as "defendant was not negligent" sufficient specification of reasons for the ground of insufficiency of the evidence.

[44] 263 A.C.A. 595, 69 Cal. Rptr. 844 (1968). This case arose from an accident in which plaintiff was injured by a concrete mixer operated by defendant's employee.

[45] *Id.* at 603, 69 Cal. Rptr. at 849 (by implication).

[46] *Id.* at 602, 69 Cal. Rptr. at 848.

"1. The Court is of the opinion that the jury did not understand the true import of the statement of counsel for plaintiff, when he, in the course of his argument to the jury, addressed the Court and said he wished to dismiss the action against the defendant Everett Wallace, the employee of the defendant Calabrese Supply Company, a corporation; that this ill chosen strategy of counsel for the plaintiff left the impression with the jury that the plaintiff was exonerating the said employee of said defendant corporation of negligence; that the jury concluded that if the defendant corporation's employee, Everett Wallace, was not negligent, the defendant corporation could not be held under the rule of *respondeat superior*, overlooking the instruction of the Court that if Everett Wallace was negligent his negligence would be imputed to the defendant Calabrese Supply Co., a corporation, his employer. . . ." *Id.* at 601-02 n.3, 69 Cal. Rptr. at 848 n.3.

"2. The Court is of the opinion that since the defendant corporation's employee, Everett Wallace, was in charge of the dangerous instrumentality and was in control of the device to raise and lower the chute, it was his duty to take the precaution to check the arc of the chute to determine whether the maximum height to which the chute could be elevated would safely clear the wall upon which the plaintiff was working at the time the cement mixer was put into operation; that this was a duty that should not have been delegated to anyone else unauthorized or unfamiliar with the actual operation of the particular concrete mixer being used, even though Wallace

In *Hilts v. County of Solano*[47] the trend of the courts of appeal toward upholding new trial orders with a brief specification of reasons was broken.[48] In *Hilts* the plaintiff was granted a new trial and one of the defendants appealed. The trial judge's order for new trial stated that the evidence indicated the defendant was negligent and the decedent was not negligent.[49] The appellate court held that, even if the trial judge's order could be construed as based on the ground of insufficiency of the evidence, the order failed since it did

---

may have been assisted in the pouring of the cement by the employer of the plaintiff, Dusharme, and by another employee of the latter, Clifton Leon Jackson; . . ." *Id.* at 601-02, 69 Cal. Rptr. at 848-49.

"3. It is the opinion of the Court that the jury was misled by the questions propounded in the Special Findings, prepared by counsel for the Intervenor, State Compensation Insurance Fund, and submitted with the consent and approval of counsel for all of the parties; that the questions propounded and the answers made by the jury were: 'Was the plaintiff's employer, Wendell P. Dusharme, or the plaintiff's co-employer, Clifton Leon Jackson, negligent? Yes.' 'Was said negligence of either Wendell P. Dusharme or Clifton Leon Jackson a proximate cause of plaintiff's injury? Yes.'; and that by these Special Findings the jury was misled into believing that the only remaining culpable persons were the plaintiff's employer, Dusharme, and the plaintiff's fellow employee, Jackson, especially after the dismissal of the action against the defendant corporation's employee, Everett Wallace, by the counsel for the plaintiff during his argument to the jury." *Id.* at 601-02 n.3, 69 Cal. Rptr. 848 n.3.

[47] 265 A.C.A. 181, 71 Cal. Rptr. 275 (1968). This case arose out of an automobile accident. Plaintiffs sued the driver of the other automobile and also the county which designed the intersection.

[48] It is possible that the trend of the courts of appeal towards leniency in the review of new trial orders was broken just prior to *Hilts*. *See* McLaughlin v. San Francisco, 264 A.C.A. 377, 70 Cal. Rptr. 782 (1968). In *McLaughlin* the negligence of the defendant was stipulated and the case went to trial solely on the issue of damages. Defendant's motion for new trial was granted on the ground of insufficiency of the evidence to justify the verdict and, "[B]ased on failure to prove reasonable total damages both general and special. . . ." The appellate court on review held that the ground, insufficiency of the evidence, was clearly stated but that the trial court failed to specify its reasons for that ground; damages were the only issues of the case and the purported reason was that the evidence on those issues was insufficient. The "reasons" merely restated the ground itself, so the order could not be sustained on the ground of insufficiency. The appellate court also mentioned that speculation was needed to decide which part of the special or general damages was unreasonable speculation which was to be eliminated by compliance with the amendment to section 657.

The reviewing court did not specifically mention the fact that section 657 requires a conclusive presumption that both insufficiency of the evidence and excessive damages are not the ground for a new trial order if they are not supported by reasons specified by the trial judge. This provision, however, could have influenced the appellate court's decision, and indicates that the *McLaughlin* holding might truly be unique to its particular fact situation.

The holding in *Hilts*, however, leaves no doubt as to its definite departure from the trend of leniency which began with *Matlock*. In *Hilts* the new trial order was grounded on insufficiency of the evidence and the reasons were that defendant was negligent and the plaintiff was not. The new trial order in *Hilts* cannot be distinguished from the trial judges' specification of reasons in *Matlock* and *Funderburk*. The appellate court in *Hilts*, however, chose not to follow the previous courts of appeal cases and found the trial court's specification of reasons inadequate in light of *Mercer* and section 657.

[49] 265 A.C.A. 181, 194, 71 Cal. Rptr. 275, 287 (1968).

not show the respects in which the evidence was legally inadequate.[50] Thus the order for new trial was reversed.[51]

Soon after *Hilts*, the court of appeal decided *Hoover v. Emerald*.[52] In this case plaintiff received judgment, and defendant's motion for new trial was granted on the ground of insufficiency of the evidence. The trial court, reminded by defendant's counsel that a reason was needed to support the ground, stated that there was "[N]ot sufficient evidence that defendant was negligent."[53] On appeal the court held that the ground and reasons were effectively stated in one sentence.[54] Although the trial judge made no reference as to how he reached his decision or which portion of the record supported his conclusion, the appellate court sustained the new trial order.

ANALYSIS

The large volume of cases generated by *Mercer*[55] indicates that the amendments to section 657 have left the vagueness problem in new trial orders largely unresolved. In *Mercer* the supreme court attempted to alleviate the historical problems of ambiguity in new trial orders by a strict interpretation of the statute. Within the same month *Matlock* held that one of the *Mercer* requirements, the

---

[50] *Id.* at 194-95, 71 Cal. Rptr. at 287.

[51] It is interesting to note that Justice Molinari was the appellate court judge who decided *Hilts*. Justice Molinari appeared for the Judicial Council and Legislative Committee in favor of the 1965 amendment to section 657. In an address before the California Trial Lawyers Association on September 19, 1965, the Justice stated the purposes and requirements of section 657 as amended:

> Prior to the recent amendment to section 657, the trial court in making its order granting a new trial was not required to specify the ground upon which it was granting the motion, except where it was granted upon the ground of the insufficiency of the evidence, and even as to this ground, there was no requirement for a statement of the reasons upon which the motion was granted.
>
> The significant change brought about by the amendment to section 657 is that when a new trial is granted the court is now required to specify the reason or reasons for granting the new trial upon each ground stated. Accordingly, the party against whom the motion is granted will now be advised of the rationale forming the basis of the order. In the event of an appeal, this rationale will be focused upon determining whether the trial court did in fact abuse its discretion. In other words, the scope of appellate review will be focused upon whether the reasons given by the trial court in support of the grounds stated for the granting of a new trial are in conformity with fixed legal principles and the spirit of the law which demands substantial justice. It thus appears to be the legislative intent that in the review of the propriety of orders granting a new trial the scope of review is no longer to be confined to judicial action but is to include the judicial reasoning for such action.

[52] 265 A.C.A. 725, 71 Cal. Rptr. 500 (1968). This case arose out of an automobile accident.

[53] *Id.* at 726, 71 Cal. Rptr. at 501.

[54] *Id.* at 728, 71 Cal. Rptr. at 502.

[55] See note 7 *supra*.

identification of the portion of the record upon which the trial court based its decision, was not necessary under the circumstances of *Matlock*. Shortly after *Matlock, Kincaid* also reasoned that identifying the portion of the record was not necessary and added that the trial court's reasons would be adequate if the court merely stated that the losing party was not negligent.

It is clear that vague new trial orders, which force an appellate court to search the entire record, violate the spirit of section 657 and should be avoided. However, if the insufficiency of the evidence is not in the record or permeates the entire record, it would be either impossible or impractical to require a trial judge to point out a specific portion of the record.

The trial judge should be responsible for explaining new trial orders with sufficient specificity that both counsel and the reviewing court are made aware of the precise deficiency in the evidence. The problem is to develop a workable standard which satisfies the goals of *Mercer* and resolves the practical difficulties voiced by the courts of appeal.

Theoretically, the test articulated by *Mercer* is an excellent standard to guide the review of the adequacy of the trial court's specification of grounds and reasons for a new trial. The *Mercer* test would preclude the speculation and search of the record which the amended statute attempts to eliminate.[56]

Subsequent courts of appeal decisions such as *Matlock* and *Kincaid* held that the "portion of the record" test could not be applied to their circumstances. *Kincaid's* reasoning points out a practical limitation of the *Mercer* test: A trial judge's reasons for the ground of insufficiency of the evidence often cannot be found in any one portion of the record, but must come from inferences drawn from the entire record.[57]

Although *Mercer's* "portion of the record" test is subject to justifiable criticism, *Kincaid* and its followers have undermined not only the "portion of the record" test but also the "concise but clear statement of the reasons" test. For example, according to *Matlock, Kincaid, Funderburk* and *Hoover*, the trial court may simply state that one party is "negligent" and the other party is "not negligent."

---

[56] The *Mercer* test requires both identification of the portion of the record which convinced the trial court that the evidence was insufficient and a clear and concise statement of the reasons for the ground of insufficiency. Should an appeal be taken from the new trial order, counsel and the reviewing court would know the exact points of insufficiency to which they must address themselves.

[57] Kincaid v. Sears, Roebuck & Co., 259 A.C.A. 770, 776, 66 Cal. Rptr. 915, 919 (1968).

This type of specification, if it is specification, does not inform counsel or the appellate court whether or not there are well-grounded reasons for the new trial order. For example, if the cause of action involves the issue of negligence, and the trial judge specifies that in his belief that issue should have been decided contrary to the jury verdict, he is in fact only saying that the evidence is insufficient to justify the verdict. This is not actually a *reason* supporting the ground but just another way of stating the ground. This type of specification is redundancy, not explanation, and fails to meet the purposes of the amended statute.[58]

SUGGESTED SOLUTION

Whenever possible the trial judge should point out the portion of the record which convinces him that a new trial should be granted for insufficiency of the evidence. In some cases, however, this is not possible. The trial judge may not be able to pinpoint all the evidence in the record from which he draws his inferences. For instance, a new trial may be granted largely because of the demeanor of the witness;[59] the judge may simply not believe one or more of the material witnesses who testified for the prevailing party. It is within the court's discretion to disbelieve testimonial evidence and grant a motion for new trial on the ground of insufficiency of the evidence.[60] However, demeanor often cannot be found in the written record, and it would, in some cases, therefore, be impossible for the trial judge to point to the portion of the record that supports his disbelief.

A satisfactory test for specifying the ground of insufficiency of the evidence lies somewhere between *Mercer* and *Kincaid*. The trial judge should be required to specify the respects in which the evidence was insufficient or to state with particularity why it was not substantial. The reasons must be more than mere ultimate facts as advocated by *Funderburk*.[61] The reasons must contain the pertinent *evidentiary* facts of the case which lead the trial judge to believe a new trial is warranted.[62] If the defendant is "not negli-

---

[58] See note 51 *supra*.

[59] CAL. EVID. CODE § 780 (West 1966). The witness' "demeanor while testifying" and "the manner in which he testifies" may lead the court to doubt the accuracy of his statement and influence it to disregard his positive testimony concerning a particular fact. Davis v. Judson, 159 Cal. 121, 128, 113 P. 147, 150 (1910).

[60] Mercer v. Perez, 68 A.C. 102, 107, 436 P.2d 315, 320, 65 Cal. Rptr. 315, 320 (1968).

[61] See note 43 *supra*, for an example of "ultimate fact." Note that *Funderburk* cited *Kincaid* for holding that specification of reason in terms of an ultimate fact is adequate to satisfy the requirements of section 657.

[62] The trial judge in *Ridge* enunciated his reasons by the use of "evidentiary facts." See note 46 *supra*.

gent," the court should show the particulars in which the evidence is inadequate. If the judge believes, for example, that the defendant was operating his vehicle in a reasonable manner and could not have avoided the impending collision, the judge should specify the evidentiary facts which cause him to believe that defendant was operating his vehicle in a reasonable manner.[63] Such specification of reasons would indicate why the trial judge held the verdict to be erroneous. A trial judge could give a short and concise statement, and still include the specific evidentiary weaknesses in the prevailing party's case.

The above suggested compromise would not unduly burden the trial judge.[64] A concise but meaningful specification of reasons for supporting the ground of insufficiency of the evidence would not overtax the trial judiciary and would lift the fog of ambiguity in which both appealing counsel and reviewing court have groped.

Richard C. Gardner

---

[63] Even demeanor which often cannot be found in the "cold record" could be explained by the trial judge.

[64] Section 657 requires that the judge prepare the reasons himself and, if the reasons are not included in the order, submit them within ten days from the granting of a new trial. *Kincaid* voiced the fear that pointing to a portion of the record would overburden the trial judge.